

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

No. 77-6166

77-6166

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

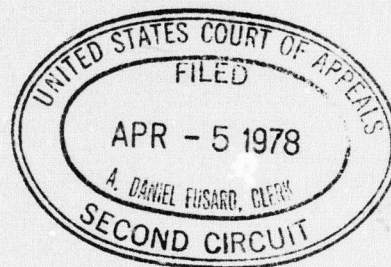
CARROLL BARNETT; HAROLD MCBRINE,
on behalf of themselves and all
others similarly situated,

Plaintiff-Appellees

v.

JOSEPH A. CALIFANO, JR.,
Secretary of Health, Education,
and Welfare,

Defendant-Appellant



BRIEF FOR THE APPELLANT

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No. 77 - 6616

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARROLL BARNETT, HAROLD MCBRINE,)
on behalf of themselves and all)
others similarly situated,)

Plaintiff-Appellees)

v.)

JOSEPH A. CALIFANO, JR.,)
Secretary of Health,)
Education and Welfare,)

Defendant-Appellant)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLANT

PRELIMINARY STATEMENT

Appeal is taken from the April 12, 1977, judgment by the Honorable Albert W. Coffrin, Judge, United States District Court for the District of Vermont. The District Court's opinion is unreported.

ISSUES PRESENTED

1. Whether the Court below had jurisdiction to decide this case.
2. Whether the court below was correct in certifying this case as a class action.
3. Whether the court below was correct in finding a violation of the Social Security Act (and the APA) in the circumstances of this case.
4. Whether it was a proper exercise of the authority of the court below to issue the particular order it issued; in particular whether it was proper for the court to set time limits for holding hearings on

Supplemental Security Income disability claims within 90 days of request and whether it was proper for the court to order payment of non-refundable benefits if such hearings were not held timely.

Statement of the Case

On November 13, 1974, the plaintiffs below brought this action on behalf of themselves and of all those similarly situated in the United States District Court for Vermont. The plaintiffs below had pending claims for Supplemental Security Income (SSI) benefits based on disability. 1/ Some also were claimants for "concurrent" Social Security Disability Insurance Benefits.) 2/ These claims had been denied at the initial and reconsideration levels of administrative review, and the plaintiffs each had appealed further by requesting a hearing before an administrative law judge. Plaintiffs' complaint challenged alleged unreasonable delays in the scheduling and holding of such hearings, alleging that such delays violated rights guaranteed by the Social Security Act, the Administrative Procedure Act, and Due Process. App. 13. Plaintiffs sought declaratory and injunctive relief in the nature of mandamus.

On May 6, 1975, the District Court found it had jurisdiction to hear plaintiffs' case based on 28 U.S.C. 1361 and denied defendant's motion to dismiss based on lack of jurisdiction. App. 27. On January 13, 1976, the court denied the defendant's motion to alter or amend the earlier finding of jurisdiction, and the court denied defendant's motion to dismiss based on mootness. App. 57. At that time the court certified

1/ SSI is a federal income maintenance program for the aged, blind and disabled codified in title XVI of the Social Security Act (Sec. 1601 et seq.), 42 U.S.C. 1381 et seq.

2/ Under Title II of the Act (Sec. 223), 42 U.S.C. 423.

a class composed of "all present and future applicants for SSI disability benefits whose initial claims are denied and who subsequently request a reconsideration (sic) hearing." App. 59-60.

On February 22, 1977, the court issued an opinion holding that the plaintiffs had suffered delays in awaiting administrative hearings which violated the Social Security Act and the Administrative Procedure Act. App. 100. The court did not decide the issue of whether Due Process had been violated.

On April 14, 1977, the court issued a final judgment (App. 113) which required that all requests for hearings in SSI (disability) and concurrent SSI (disability)/Title II Disability Insurance claims pending on July 1, 1977 should be heard within 120 days of that date. Requests filed on or after July 1 had to be heard within 120 days, and requests filed on or after December 31, 1977, had to be heard within 90 days. The order allows exceptions for certain claimant-caused delays. App. 115-116. The order additionally requires that if hearings are not held within the prescribed time limits the Social Security Administration must pay the affected claimants non-refundable benefits, as if they had been found disabled, until a decision is rendered by an administrative law judge on their claim. App. 115.

On July 11, 1977, the court issued an order denying defendant's motion to alter or amend its judgment by deleting the requirement to pay non-refundable benefits. App. 117. That order temporarily stayed the non-refundable benefit requirement pending appeal. However, on August 30, 1977, the court lifted the stay except as it applied to the refundability of the benefits payable. App. 129. On September 7, 1977, the Secretary filed a notice of appeal to this court.

In the meantime, on July 14, 1977, this court, the United States Court of Appeals for the Second Circuit, decided the case of White v. Mathews, 559 F.2d 852 (2d Cir. 1977), cert. denied 46 U.S.L.W. 3539 (February 28, 1978). 3/ In White, this court upheld an order by the United States District Court for Connecticut which required the Social Security Administration to issue administrative law judge decisions within specified time limits after requests for hearings in claims for disability insurance benefits under Title II of the Social Security Act or to pay refundable benefits to the affected claimants.

White is undeniably a very similar case to Barnett, and the existence of the White decision quite clearly colors the consideration of this appeal in Barnett, but the Secretary is pursuing this appeal on the grounds that White is not necessarily dispositive of this case. Barnett has its own factual and legal context. Moreover, the Secretary submits that developments in the overall Social Security hearing delay situation since White was decided necessitate this court's reconsideration of the propriety of an order by a United States District Court imposing time limits for holding Social Security hearings. Also, the Barnett court's order of non-refundable benefits renders it wholly different from White in terms of the relief granted.

STATEMENT OF FACTS

I. General Background

The facts of the case below are detailed at length in the briefs, interrogatories, affidavits, and stipulation of facts. In particular,

3/ As the Court is aware, the government petitioned the United States Supreme Court for a writ of certiorari in White and that petition was denied.

see Stipulation of Facts, App. 78; Affidavit of Jan J. Sagett, Deputy Director, Bureau of Hearings and Appeals, Social Security Administration, dated July 15, 1976, App. 90; Supplemental Response to Plaintiffs' Interrogatories, App. 95; and Affidavit of Jan Sagett dated January 17, 1977, App. 98.

This court is undoubtedly familiar with most of these facts concerning the general background of the national Social Security hearing delay problem because of previous consideration of White v. Mathews, supra. Barnett is different from White, however, in one primary respect because the Barnett plaintiff class is made up of claimants for benefits under the federal Supplemental Security Income program while in White the plaintiff class was made up of claimants for social security disability insurance benefits.

SSI is a federal income maintenance program for the aged, blind, and disabled for which claimants are eligible if their incomes and resources fall below certain levels and if they meet the categorical eligibility requirements of old age, blindness, or disability. 42 U.S.C. 1382. As White attests, however, Barnett involves a problem that is not just an SSI problem in Vermont but a Social Security problem generally across the nation.

It is impossible to separate the problem of delays holding administrative law judge hearings in SSI cases from the same problem in disability insurance benefits (DIB) cases. Both the SSI and DIB programs are administered by the Social Security Administration. Both programs have the same statutory and regulatory definition of disability. 42 U.S.C. 423(d); 42 U.S.C. 1382c(3)(A). Both have virtually the same procedures for

administrative appeals of denied claims, and today both types of claims are heard by the same administrative law judges. Many claimants (including some members of the plaintiff class in this case) are making concurrent claims for both types of benefits. One significant factor (discussed infra) in the onset of the whole national hearing delay problem was the beginning of the new SSI program in January 1974.

At the bottom of the national Social Security hearing delay problem is the large backlog of pending requests for disability hearings. Affidavit of Jan Sagett, dated July 15, 1976, App. 90. The administrative law judges who hear these claims must not only hear current requests but must also hear the old pending cases.

This court in White took note the reasons for the development of the backlog beginning in the early 1970's. See White at 859. There was a one-time "flood" of claims for benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. section 901 et seq., and the SSI program began in 1974 bringing with it many more hearing requests. Meanwhile, hearing requests under the Disability Insurance Program were also increasing dramatically. 4/

4/ The following chart shows the hearing request, hearing, and pending caseload situation from FY 1972 through FY 1977. (as of August 1977):

	<u>Requests for Hearings +</u>		<u>Hearings</u>		<u>Pending</u>
	Total	Title II Disability	Total	Title II Disability	
FY 1972	103,691		61,030		65,534
FY 1973	72,202	52,314	68,356	53,368	36,780
FY 1974	121,504	67,284	80,783	55,613	77,233
FY 1975	154,962	99,003	121,026	72,378	111,169
FY 1976	148,037	113,263	165,568	113,255	89,769*

(Includes Transition Quarter ending September 30, 1976)

(continued on page 7)

The problems created by these increasing requests and the increasing pending caseload were additionally compounded at first by the fact that there were legislative and administrative obstacles which hindered SSA from efficiently utilizing hearing officers. White at 859. There were three distinct corps of hearing officers separately hearing Title II, SSI and Black Lung cases. 5/ SSA, moreover, had

4/ (continued)

FY 1977 (thru August)	177,235	131,784	186,274**	118,894**	91,812
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* as of October 1976

** through July 1977

+ Over 70,000 hearing requests through FY 1976 were from the Black Lung Program which was only a temporary SSA responsibility. As of December 1977 receipts for FY 1978 were 6.2% above estimates and there were 92.8 thousand pending cases. (In December 1977 processing times were the lowest in years, however). Social Security Administration, Office of Management and Administration, Monthly Indicators Report, December 1977. Exhibits 1-3. These are the most recent statistics made available to counsel by the Bureau of Hearings and Appeals of the Social Security Administration. See Operational Analysis of the Bureau of Hearings and Appeals, BHA Pub. No. 032 at p. 6 (June 1977). Exhibits 4, 5. Note similar statistics referred to in defendant's Memorandum in Support of a Motion for Summary Judgment below at p. 6. See also General Accounting Office, Problems and Progress in Holding Timelier Hearings for Disability Claimants 4, 8 (1976). Exhibits 7, 8. See note 10 infra. Copies of the materials referred to in this note and other recent relevant materials have been supplied to the court and appellees' counsel in the following fashion: One copy of the full text of each relevant report has been supplied, and also relevant portions of such reports and other materials have been copied and supplied in one bound volume as "Exhibits to Appellant's Brief". This material will be cited in full in the text of this brief and referred to as "Exhibits ____."

5/ The problems created are well illustrated by the Vermont situation. In Vermont there was no backlog in the caseload of the SSI-only hearing officer and he heard cases within 30 days to six weeks of his receipt of a request. However, for concurrent claims there was a backlog, and there were longer waiting periods. Stipulation of Facts, paras. 41, 42, App. 86-87.

difficulties recruiting administrative law judges to hear Title II cases. Affidavit of Jan Sagett, App. 90. SSA had even more difficulty recruiting Black Lung ALJs because such positions were only temporary, and SSI hearing officers because they were paid less. See Defendant's Memorandum in Support of a Motion for Summary Judgment, at 6-7. Accordingly, while the pending caseload increased, it was hard for SSA to keep pace with the needed hearing officers to hear the cases.

Entwined with the growing workload and difficulty of staffing is another fundamental factor in the hearing delay problem. That is the nature of the inquiry into eligibility for SSI and Title II benefits based on disability. This factor is discussed in White at 854. See also Defendant's Summary Judgment Memorandum at 7-8.

The hearing before an administrative law judge is the third step in the administrative process of an SSI or social security disability claim which begins with initial determination, then includes reconsideration, administrative law judge hearing, Appeals Council review, and finally the opportunity for judicial review under 42 U.S.C. 405(g). The process is basically the same for SSI as for Title II. See 20 C.F.R. 416.901 et seq for the disability provisions in the SSI regulations and 20 C.F.R. 404.1501 et seq for the Title II disability provisions. See sections 416.1401 et seq for the SSI appeals process and 404.905-990 for the Title II appeals process. The definition of disability, as noted already, is the same for both programs. 20 C.F.R. 416.901; 20 C.F.R. 404.1501.

The disability hearing process by its nature must be time consuming. It is a non-adversary process, and the regulations provide that the administrative law judge "shall inquire fully into the matters at issue

...". 20 C.F.R. 404.927; 416.1434(a). The administrative law judge must, therefore, develop all relevant evidence that is reasonably available.

The ALJ must rely initially on evidence from private physicians, hospitals and other agencies and institutions. Stipulation of Facts, paragraphs 21-22, App. 84. 6/ Medical evidence presented in disability claims may be incomplete, imprecise, conflicting, or inconclusive, so the administrative law judge himself often must initiate additional development even before a hearing. See Stipulation at paras. 20, 21, and 25, App. 84. The Administrative Law Judge may find it necessary to request that the cooperating state agency arrange for one or more special consultative examinations (20 C.F.R. 404.1527), and the ALJ also may need testimony from an outside vocational expert or a medical advisor. Such experts must be allowed time to study the evidence before a hearing. The claimant himself, moreover, has a continuing right to see the evidence in the record, and he has a continuing right to supply more evidence at any time which may require additional study. 20 C.F.R. 416.1442. This "open file" concept allows a claimant the continuing opportunity to establish his eligibility. These provisions (set forth here in abbreviated fashion), although inherently time consuming, are designed to insure the quality of the adjudicative process so that the claimant has a fair hearing and a correct decision.

6/ The SSI regional development centers which are discussed in the Stipulation (App. 83-85) and which previously collected medical evidence for SSI hearing officers were abolished in 1977. 42 Fed. Reg. 25535 (May 18, 1977). SSA determined that the centers added an extra, essentially duplicative, step to the development process. Now ALJs develop their own evidence in SSI cases.

II. The Named Plaintiffs Below

The facts relating to the named Vermont Plaintiffs have been stated in the briefs and affidavits below. Stipulation, paras. 1-9, App. 78-80. Carroll Barnett waited 10 months for his hearing. The other plaintiffs and intervenors waited from 3 to 13 months for an average of 7 months. Parts of these waiting times can be explained by such factors as the need to develop evidence, but it cannot be denied that there have been long waiting times.

III. Attempts By SSA And Congress To Solve The Hearing Delay Problem

The Secretary, the SSA, and Congress have recognized that there is a hearing delay problem, and numerous attempts have been made to find solutions.

SSA has hired a significant number of support personnel and staff attorneys to assist administrative law judges and has purchased new equipment. Sagett Affidavit, App. 91. SSA has tried very hard to increase the number of administrative law judges. 7/ SSA has instituted new management techniques such as the "informal remand" procedure which is designed to award benefits in cases where favorable action is possible without a hearing. See White at 859 and Sagett Affidavit, App. 92. SSA has attempted to make the most efficient use of the administrative law judges it has by making special details to areas where the need is greatest. Of particular relevance to this case, for example, the SSA Bureau of Hearings and Appeals assigned 23 extra administrative law judges to SSA Region I, which includes Vermont, in July 1976. These

7/ SSA doubled the number of hearing officers from 295 in FY 1971 to 613 in FY 1975. GAO Report 4. Exhibits 1.

were replaced by an additional detail of 25 in September 1976. Supplemental Response to Plaintiff's Interrogatories App. 97. SSA has made other management decisions designed to increase efficiency. In January 1976, a new hearing office was opened in Maine. That meant that the Manchester, New Hampshire hearing office which serviced Vermont had nearly twice the available resources to meet the demand in Vermont. Stipulation of Facts, para. 60, App. 88-89. Finally, SSA has attempted to increase administrative law judge productivity overall. Goals were set for productivity 8/ and for processing time. Stipulation of Facts, paras. 52, 61, App. 88-89.

Congress, in the meantime, has been continually aware of the problem. Extensive hearings were held on the subject in 1975. Hearings Before the Subcommittee on Social Security of the Committee on Ways and Means, 94th Cong., 1st Sess. (1975). 9/ Congress at that time considered H.R. 5276 (Rep. Seiberling) which would have imposed a 120 day time limit between hearing request and decision by an ALJ, but Congress did not pass such legislation. The Staff of the Subcommittee on Social Security had cautioned against such an approach observing:

The appeals crisis is almost wholly the creature of the social security and SSI disability programs and although mandating by statute certain processing time limits might seem on the surface a desirable thing to do, such legislation might also have an adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect.

8/ As appears infra, at 13, ALJ productivity has in fact doubled since 1974 from 14.8 to 27 cases per month.

9/ Copies of the Hearings were submitted to the Court below as attachment "B" to defendant's Summary Judgment Memorandum (see page 5). Exhibits 32-43 contain the testimony of the then Commissioner of SSA, James B. Cardwell, at the hearings.

Appeals Process: Areas of Possible Administrative or Legislative Action,

Staff of House Subcommittee on Social Security, Comm. Print 94-91 (Ways and Means), 94th Cong., 1st Sess. 1-2 (1975). Exhibits at 45, 46.

Instead of time limits Congress passed P.L. 94-202, 89 Stat. 1135 (1976), which authorized the Secretary to utilize SSI and Black Lung hearing officers to hear Title II cases as necessary so that all the hearing officers could be utilized most efficiently.

Congress, as a result of its hearings, also initiated further studies of the Social Security appeals process. See Defendant's Summary Judgment Memorandum at 12. Out of these studies came significant in-depth reports by the General Accounting Office and the Center for Administrative Justice which indicate the size and complexity of the problem. 10/

IV. Improvements

The efforts by SSA and the new legislation by Congress brought improvements in the hearing picture.

10/ General Accounting Office, Problems and Progress in Holding Timelier Hearings for Disability Claimants (1976); Center for Administrative Justice, Final Report: Study of the Social Security Administration Hearing System (1977). Copies of the full reports have been supplied to the court and counsel for appellees. See also Exhibits 6 and 47. The Center for Administrative Justice Report is a very important development which has occurred since this court's decision in White. Several conclusions were reached by each of these reports. Both pointed to the overwhelming workload faced by SSA. GAO at 8, Exhibit 8. CAJ at xix, Exhibit 51. Interestingly, GAO suggests that SSA may have tried to do too much too quickly to solve the problem. Id. at 30, Exhibit 30. GAO (at 30, Exhibit 30) also notes, in addition to the backlog, other problems out of SSA's control such as need to rely on outside sources for evidence. Ultimately, GAO (at 30, Exhibits 30) commends SSA for its efforts. CAJ, in 325 pages, touches every facet of the hearings process offering a number of thoughtful criticisms. Most significantly both CAJ and GAO determined that there are no simple solutions to the problems in the hearings process. GAO at 30, Exhibits 30. CAJ at xiv, Exhibits 49.

Nationally, the productivity of administrative law judges increased from 14.8 cases disposed of per month in September 1974 to 23 cases decided per month in January 1976. 11/ For a time this increase in productivity decreased the backlog of pending cases. The total pending cases fell from a high of 113,000 in April 1975 to 88,000 in June 1976. Affidavit of Jan Sagett, para. 9, App. 93. (See Also n. 4, infra, for most recent statistics.) At that rate, SSA could have reached its goal of 60,000 pending cases by some time in 1977. With such a caseload SSA estimated that it could hear cases within 90 days of request. 12/

However, in 1976 there was a large unexpected increase in the number of hearing requests. Requests went up 25% over estimates in FY 1976, and the increase in administrative law judge productivity was not enough to prevent a decline in the rate at which the pending caseload was reduced. Affidavit of Jan Sagett, App. 93. Supplemental Response to Plaintiffs' Interrogatories, App. 96. Even with the additional flexibility afforded by P.L. 94-202, and increased ALJ productivity, SSA did not have enough ALJs to meet the increased demands. Supp. Response to Plaintiffs' Interrogatories, App. 96.

11/ By March 1977, productivity was 27 per month. Background Material on H.R. 5723: Conversion of Temporary Social Security ALJs 4, Staff of House Subcommittee on Social Security (Comm. Print 95-16 (Ways and Means)), 95th Cong., 1st Sess. April 18, 1977 (Copies supplied to court and appellants' counsel). Exhibits 54. BHA considered about 26 cases per month per ALJ an optimum disposition rate. Stipulation of Facts, para. 52, App. 88. BHA is now working toward a goal of 30 cases per ALJ per month. Such goals are an attempt to balance maximum feasible productivity against the Congressional concern over quality of adjudication. See GAO Report at 24. Exhibits 24.

12/ The GAO report, supra, at p. 10, discusses the advisability of maintaining a reasonable pending caseload. Exhibits 10.

The Vermont picture, however, was probably better than the national picture by the fall of 1976. Because of the increased resources made available by the smaller jurisdiction of the new Manchester, New Hampshire hearing office, the greater flexibility in hearing officers brought about by P.L. 94-202, and the extra administrative law judges detailed to Region I, almost the entire backlog of Vermont hearing requests had been assigned to administrative law judges and scheduled for hearing by January 1977. Affidavit of Jan Sagett, dated January 17, 1977, App. 98.

The greatest problem in Vermont had been the backlog of cases not assigned to the hearing officers. 13/ In August 1975 there were 124 unassigned SSI requests for hearing, a significant number in the small state of Vermont. Stipulation of Facts, para. 49, App. 87. However, SSA's efforts to improve the situation produced dramatic results in this area. By March 1976, unassigned Vermont SSI requests were down to 68, Stipulation, 49, App. 87; and in January 1977 there were only four unassigned Vermont SSI requests. Affidavit of Jan Sagett, dated January 17, 1977, App. 98.

This improvement in assignment of cases to ALJs helped improve the overall processing time for Vermont requests. By January 1977, the ALJs for Vermont were hearing cases filed in September 1976. Sagett Affidavit, App. 99.

13/ See note 6, supra. The development centers were discontinued by SSA partially, at least, in response to the GAO Report. SSA has also tried to speed assignment of cases in response to the GAO Report.

SUMMARY OF ARGUMENT

1. White v. Mathews, although a very similar case to Barnett is not dispositive of the issues in this case. White, does, however, establish the appropriate test by which the opinion and order of the lower court may be judged. Barnett has a different factual and legal context than White. Also, there have been developments since White which indicate that the issues should be reevaluated.

2. The court below was wrong in finding that the Secretary has violated the Social Security Act and the Administrative Procedure Act in this case by failing to hold social security hearings in a "reasonable time." The court also was wrong in holding that 90 days is the maximum "reasonable time" for holding social security hearings. Nowhere does the Social Security Act (or the APA) require that hearings must be held in a certain time, and what time actually is "reasonable" may only be determined by the circumstances of the case.

In this case the Secretary faces an overwhelming workload, but he has only limited resources. The Secretary has tried very hard though and, given the context of the situation, the Secretary has done a reasonable job in dealing with the hearing delay problem. Ultimately, it is up to Congress, which wrote the Social Security Act, to decide what is a reasonable time under the Act and to provide the resources necessary to accomplish such a time. Congress, however, has not legislated time limits despite continuing intensive study of the problem. Congress is more concerned with quality of adjudication than with speed.

3. In any event, the order of the court below is not a proper or reasonable response to the hearing delay problem under the White criteria. Barnett differs from White in several key respects. Barnett involves a different program, the Supplemental Security Income (disability) program,

which unlike the Disability Insurance Benefits (Title II) program considered in White offers Goldberg v. Kelly continuation of benefits pending hearing to recipients threatened with termination. Barnett is less reasonable than White in the time limits imposed on the Secretary and less reasonable in its allowances for administrative development of evidence — points upon which the lower court order in White was praised by this court. Barnett, further, unreasonably ignored the facts of the particular situation in Vermont where the Secretary was making progress. Most importantly, Barnett is totally improper because it requires payment of non-refundable benefits to potentially ineligible applicants if time limits are exceeded. This requirement does nothing to benefit truly needy claimants and only serves as an unwarranted punishment of the Secretary and a drain on the revenues available to eligible persons in complete disregard of the Social Security Act and Congressional concern.

4. Finally, since the White decision by this court, it has become more clear that court orders of time limits are not an adequate solution to the hearing delay problem and that such orders actually may exacerbate the problem. While the Secretary has continued to work on the problem and the situation is improving, the problem is still there. Important new studies of the issue have concluded that there are no simple solutions to hearing delays. Congress, meanwhile, has continued to reject legislating time limits. Congress instead has emphasized the need for quality of adjudication. This indicates that Congress, which enacted the Social Security Act omitting time limits for hearings, has held to its original public policy decision that time limits are not the ultimate solution to the hearing delay problem.

Argument

I. The Application of White

White v. Mathews, though a case very similar to Barnett, is not dispositive of Barnett. This court in White was explicit in stating that its decision was based on the particular opinion and order by the United States District Court⁺ for Connecticut and the particular facts of that case. Barnett involves a different opinion and order and a different factual context. Moreover, since the White decision by this court, the factual and legal contexts of the overall social security "hearing delay" problem have changed (as developed more fully below) so that the White decision is no longer entirely relevant to the current situation. The Secretary respectfully submits that it is appropriate for this court to reevaluate in Barnett the issues it considered in White.

White, however, establishes the test of reasonableness which is to be applied to determine the validity of the opinion and order of the lower court. White at 860. Applying the White test to the Barnett case, the Secretary submits that Barnett should be reversed.

Before analyzing in detail the differences between Barnett and White, and the recent developments, it seems appropriate to review the factual and legal arguments already advanced by the Secretary in this action.

II. The Secretary Has Not Violated The Social Security Act Or The Administrative Procedure Act In This Case

This court is undoubtedly familiar with the basic arguments advanced by the Secretary in this action below because they are the same

basic arguments advanced previously in White. However, the Secretary respectfully requests the court's indulgence as he outlines these arguments once again. The Secretary believes that these arguments should be carefully reconsidered in light of Barnett.

The court below held that the Secretary violated the provision of the Social Security Act which states that claimants for SSI benefits whose claims are denied are entitled to a "reasonable notice and opportunity for a hearing." 42 U.S.C. 1383(c)(3). The court interpreted this provision to require hearings to be held within a reasonable time and found that a reasonable time was 90 days. App. 106, 108, 109.

Nowhere, however, does the Social Security Act require that requests for hearings in SSI disability claims be heard in any certain time. Quite to the contrary, Congress, in 42 U.S.C. section 1383(c)(2), requires that a decision be rendered by an administrative law judge in 90 days after a request for a hearing in all cases except those involving a disability issue. If Congress had intended for the Social Security Act to require disability hearings to be heard or decided within any specific period of time it would have so provided. The Secretary thus respectfully submits that the court below was wrong in holding that the Secretary violated the Social Security Act in this case by failing to hold disability hearings in 90 days.

The court below also held that the Secretary violated the portion of the Administrative Procedure Act, 5 U.S.C. section 555(b), which states:

With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it.

The Secretary submits that this provision of the APA does not apply to this case because the Social Security Act has its own specific statutory scheme for administrative review. See Richardson v. Perales, 402 U.S. 389, 409 (1971). In any event, the "reasonable time" standard which the court found violated in this case is the same criterion whether invoked under the APA or the Social Security Act. The Secretary accordingly will couch his analysis of the "reasonable time" standard in terms of the Social Security Act with the belief that this analysis applies equally to the APA. 14/

The Secretary respectfully submits that the decision of the court below was in error because a "reasonable" opportunity for a hearing is not an absolute standard, and what is reasonable must be determined by the entire context of the Social Security hearing problem.

The Secretary has already alluded to the fact that this problem is not just a Vermont problem or just an SSI problem. It is a national Social Security problem, and the crux of it is a matter of available resources versus workload. 15/ The Secretary and the Social Security Administration have a finite budget which is approved by Congress, and a certain portion is allocated to BHA for the purpose of holding social security hearings. Civil Service rules further determine how much SSA can pay ALJs.

14/ The court below did not decide plaintiffs' due process claim. (This court did not reach that issue in White.) Due Process is not directly addressed in this brief, but the Secretary notes that the due process test expressed by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319 (1976) is essentially a test of reasonableness, balancing the plaintiff's interest, the defendant's interest and the public interest.

15/ There, of course, are a myriad of complicated factors in the problem. These are discussed in great detail in the Center for Administrative Justice Report and the GAO report. See n. 10, supra.

BHA now has available about 650 administrative law judges, and BHA has continually been trying to get more. However, the total number of ALJs which BHA can get is ultimately limited by the money made available by Congress, by how many judges can be recruited at the salary paid, and by the numbers Civil Service can provide on registers. 16/

The workload, compared to the resources available, is simply too great for SSA to cope with. As of the end of FY 1977 there were 93,000 pending requests for hearings. Social Security Administration, Office of Management and Administration, Monthly Indicators Report for December 1977 at 47. Exhibits 2, 3. 17/ The number of requests has continued to rise annually: In 1977 there were over 177,000 requests compared to 148,000 in 1976. Requests are already up 6% over estimates for FY 1978. Exhibits 3. Although ALJs nationally are currently averaging hearing about 27 cases per month (previously considered an optimum figure by BHA), at that rate it would take 650 administrative law judges about 6 months just to hear the current backlog.

The Secretary, as described supra, has tried very hard to improve the hearing situation, and improvements have been made, most notably, the increase in administrative law judge productivity. However, the only conclusion that can be reached is that despite the progress, more resources, more ALJs, are needed. The improvements simply can not keep up with the workload, given the current resources available to SSA.

16/ BHA has informed counsel that in April 1977 SSA requested a register from the Civil Service Commission for 50 ALJs. Only 21 were obtained. In July 1977, 27 ALJs were requested and 20 obtained. In November, 105 were requested, but only 25 were obtained. In January 1978, BHA requested 65 more.

17/ These latest statistics show that processing time for social security hearings for December 1977 was 188 days — the lowest level in years, 37 days below December 1976.

At this point it cannot be over emphasized that the Congress is well aware of this situation. The major study (supra note 10) commissioned by Congress on this issue concluded:

"[T]he basic causes of the backlog . . . and the resultant delay[s] are increasing demands for hearings without a corresponding increase in the resources available to process the cases." Center for Administrative Justice, Final Report: Study of the Social Security Administration Hearing System xix (1977). Exhibits 51.

The court below recognized that the Secretary is trying to solve the hearing delay problem. It noted "a continuing progress toward alleviating such delays as exist." App. 102. This court in White said the Secretary's efforts were "commendable." White at 859. But despite the recognition of the Secretary's efforts, the court below found they were not good enough. The Secretary, however, submits that in the context of the national and Vermont hearing situations SSA has done a reasonable job in holding hearings and that there was no violation of the Social Security Act in this case. The Secretary submits that the court below was wrong in finding that SSA was not holding hearings in a reasonable time when SSA was doing as well as could be expected under the circumstances. 18/ Furthermore, although the Barnett opinion and 18/ The United States District Court for Colorado has articulated this view:

"This is a complaint seeking injunctive relief, and injunctive relief only. It is a case seeking an order out of me to tell the Social Security to speed up.

I think it's extremely unfortunate that the claims of these people cannot be ruled upon sooner. I think it's extremely unfortunate that these delays are encountered. I think it's equally unfortunate that deserving plaintiffs in this court can't get their cases tried without a long delay, but I don't think it's the Court's function to interfere and to order the Social Security people to do the impossible.

They're working pretty long hours now, just as the courts are working pretty long hours. The courts can't handle their load because Congress won't give us the judges and the court-

order below are seemingly supported by this court's decision in White, the Secretary respectfully argues that White does not necessarily support Barnett.

III. The Order By The Court Below Is Unreasonable And Should Be Reversed

White specifically found that the order of the court below was reasonable. In comparison, however, Barnett is not reasonable and should be reversed.

There are a number of factors by which the Barnett order may be distinguished from White.

A. Factors Distinguishing Barnett From White

1. Different Factual Context

By January 1977, a month before the initial court decision below, the social security hearing situation had improved dramatically in Vermont. There had always been a comparatively few hearing requests in Vermont because it is a small state. Accordingly, the management attempts (new hearing office; detail of administrative law judges to region I) by SSA to hold hearings more efficiently and timely had a significant impact in Vermont. Affidavit of Jan Sagett, App. 98.

18/ (continued)

rooms and the manpower; and Social Security can't handle its load because the Congress won't give them the employees, the administrative law judges, the office space and the manpower.

And I can't manufacture the money sitting here on this bench, and I do not think that it is the function of a judge to order the impossible. I am happy to say that even the Complaint does not suggest any conscious fault on the part of the Social Security people. Even the Complaint recognizes that there is no malicious or intentional delay.

There is just simply an impossible overload; * * *"
From transcript of oral ruling on March 18, 1976 by Honorable Fred M. Winner, Judge, denying plaintiffs' motion for class certification. Solberg v. Mathews, No. 75-W-933 (D. Col. dismissed September 16, 1976). Exhibits 55.

In January 1977 all four Vermont hearing requests had been assigned to administrative law judges, and the ALJs were hearing Vermont hearings requested in September 1976. These Vermont requests were therefore, at that point, being heard in around 120 days. The Secretary submits that such waiting periods were hardly unreasonable and that a court order was not necessary.

The court below was unreasonable in that it recognized that the Secretary was progressing, but issued its order anyway. One reason cited by the court (App. 102, 106) for issuing an order was SSA's failure to meet its own 90 day goal, even though SSA had offered a reasonable explanation for the failure to meet the goal as soon as first projected — unexpected increases in requests. The Secretary should not be subject to a court order just because he set a goal and tried to meet it but failed because of unanticipated difficulties. 19/ It would have been appropriate for the court below to allow the Secretary to continue to progress administratively toward meeting his own goal. Cf. Richardson v. Wright, 405 U.S. 208 (1975).

2. Different Programs

Barnett involves the SSI program, title XVI of the Social Security Act, instead of the Disability Insurance program, title II of the Act.

19/ This court in White (at 860, n. 10) also made pointed note of the Secretary's goals. However, some perspective should be maintained regarding the 90 day goal. First of all, as actually articulated by the Commissioner in Congressional hearings, the goal was a 90 day median processing time, not all hearings in 90 days. Second, although the Commissioner did emphasize that the goal was realistic, he initially noted that SSA had never, even before the onset of the big backlog, met a 90 day median processing time. See House Hearings at 39, Exhibits 37. SSA was going further than it had ever gone before in setting a 90 day goal and thus certainly further than it reasonably had to in the circumstances. This is no basis for a court order.

This court in White emphasized the social insurance aspect of the disability insurance program (White at 860, n. 11) suggesting that part of the White class' right to hearings in a particular time derived from the fact that workers had contributed to the Disability Insurance Trust Fund and thus had some sort of quasi "contractual" interest in benefits if they were eligible. SSI, however, unlike title II, is not a contributory social insurance program but strictly an income maintenance program. SSI claimants, having been determined ineligible twice, at initial determination and at reconsideration, do not have in any sense a vested right to benefits. Cf. Lavine v. Milne, 96 S.Ct. 1010 (1976); See Defendant's Summary Judgment Memorandum at 20-23. The Supreme Court has found only that welfare recipients have a "right" to continuation of benefits after they have been determined eligible and are receiving benefits. Goldberg v. Kelly, 397 U.S. 254 (1970).

In this regard, however, it is significant in this case that recipients of SSI do indeed have Goldberg rights. See Mathews v. Eldridge, 424 U.S. 319 (1976), at n. 27; 20 C.F.R. 416.1336; Cardinale v. Mathews, 399 F. Supp. 1163 (D. D.C. 1975). If SSA determines that an SSI disability recipient is no longer disabled, that recipient has a right to a prior notice and hearing; and he may appeal and receive continued benefits pending his hearing before an administrative law judge. 20 C.F.R. 416.1336(c). Thus, the "hearing delay problem" does not affect in any adverse way an SSI recipient whose benefits are threatened with suspension or termination.

This is in direct contrast to the situation of the named plaintiff George White who awaited his administrative law judge hearing as a terminated Disability Insurance beneficiary without continued benefits. This court in White laid particular emphasis on this aspect of the Title II hearing delay problem stating: "The absence of pre-termination hearings makes it all the more important to expedite adjudication of claims of erroneous termination." White at 859. This court should now be aware that there is this significant difference between the Barnett and White classes. The Barnett class is made up only of persons who are initial applicants who have not been found eligible for SSI benefits on initial determination and after reconsideration.

3. Different Time Limits

The United States District Court for Connecticut in October 1976 (Exhibits 59) ordered that by July 1, 1977 decisions should be made by administrative law judges on Title II claims within the following time periods:

- (a) For any request filed before December 31, 1977, within a maximum time of one hundred eighty (180) days.
- (b) For any request filed on or after December 31, 1977, but before July 1, 1978, within a maximum time period of one hundred fifty (150) days.
- (c) For any request filed on or after July 1, 1978, within a maximum time period of one hundred twenty (120) days.

The White district court allowed the Secretary over a year before he had to issue decisions within 180 days, and the court allowed the Secretary 20 months before he had to meet the final 120 day time limit from request to decision. This court in White specifically noticed the reasonableness of this time schedule. White at 859.

In contrast the Barnett court below allowed the Secretary less than a year 20/ before he had to begin holding hearings within 90 days of request. On April 14, 1977 the court ordered:

Defendant Joseph Califano, his agents, employees, successors or assigns, is enjoined, ordered, and directed to conduct administrative law judge hearings requested pursuant to Section 1361(c) (sic) of the Social Security Act, 42 U.S.C. section 1383(c), by residents of the State of Vermont claiming Title XVI SSI benefits on account of disability or concurrent SSI benefits and Title II Social Security Disability Insurance Benefits within the following time periods:

(a) With respect to [currently pending] requests for hearing made by a Vermont claimant pursuant to 20 C.F.R. section 416.1425, within 120 days of July 1, 1977;

(b) With respect to requests by Vermont claimants pursuant to 20 C.F.R. section 416.1425 made on or after July 1, 1977 and before December 31, 1977, within 120 days of the requests;

(c) With respect to requests made on or after December 31, 1977 by Vermont claimants pursuant to 20 C.F.R. section 416.1425, the hearing shall be held within 90 days. App. 114.

Although the orders are not directly comparable (request to decision versus request to hearing) it is clear that the Barnett court was much less reasonable in its time limit increments than was the White court.

4. Different Allowances for Evidence Development

There is an important difference between the White and Barnett orders in terms of development of evidence. Again, Barnett is less reasonable than White. White, in ultimately requiring a decision within 120 days of request, allows a post-hearing exception in case the ALJ determines that an additional

20/ The decision containing the time limits was rendered on February 22, but the order was not finalized until April 14. The Secretary does note that by negotiation between the parties the terms of the time limits were somewhat liberalized. See App. 109, 110 and App. 114.

consultative examination or additional medical evidence is necessary.

21/ Thus, if more evidence is needed to assure the accuracy of a decision the White order allows the Secretary more time to develop that evidence from outside sources. The Barnett order, in contrast, allows no similar exception. 22/

The Barnett order ultimately requires a hearing within 90 days of request, and if a hearing is not held in that time, the Secretary must pay non-refundable benefits until a decision is issued. App. 115. In the absence of this order, an ALJ might determine in his pre-hearing

21/ White provides the following exceptions:

(4) Exception from the maximum time periods set out in paragraph (1) occurs in those cases in which the claimant:

(a) Directly causes a delay by his or her own failure to provide essential information for adjudication;

(b) Requests a delay;

(c) Fails to appear for scheduled hearing; or

(d) The administrative law judge as a result of evidence adduced at the hearing or in the course of his post-hearing review in good faith determines that a consultative medical examination or additional medical evidence in the possession of third parties is required. Provided, however, that the exception from the maximum time limit shall be limited to the time required to produce the evidence. Such additional material shall be obtained with all due diligence. Exhibits 60, 61.

22/ The Barnett opinion and order dated February 22, 1977, explicitly allowed exceptions only for delays "caused directly by a petitioner's own failure to provide essential information for adjudication or . . . otherwise directly caused by a petitioner." App. 110.

development that a pre-hearing consultative examination was advisable to fully and accurately develop the record. However, this order discourages the ALJ from requesting such a consultative of his own accord because it would be potentially very time consuming. The ALJ therefore may be required, solely because of the order, to hold a hearing without complete evidence. After a timely hearing, of course, the ALJ might request a consultative before a decision, but the result could be the need for an additional hearing and a delay in the issuance of a decision.

The Barnett order does allow an exception 23/ to the requirement to pay non-refundable benefits, if an ALJ determines after an untimely hearing that a consultative examination is necessary, and if the claimant refuses to attend. But the order still discourages the ALJ from taking the time for the additional development. The ALJ is instead encouraged

23/ Barnett allows:

(3) Exceptions to the maximum time period set out in paragraph (1) occur in those cases in which:

(a) the claimant or his representative causes a delay by his failure to provide information essential for adjudication;

(b) the claimant or his representative request a delay;

(c) the claimant or his representative fails to appear for a scheduled hearing;

(d) other action or omission directly attributable to the claimant or his representative.

(4) Benefits paid pursuant to this order shall be suspended after the time limits have been exceeded if the claimant refuses to cooperate in attending a scheduled hearing or in going to a consultative (sic) examination as deemed necessary by the administrative law judge or in obtaining any other necessary evidence. App. 115, 116.

to issue a decision as soon as possible after an untimely hearing to avoid continued payment of non-refundable benefits. Thus, the order encourages exactly what the Congress has expressly sought to avoid -- the sacrifice of quality of adjudication for quantity. See p. 11 supra and pp. 39-40 infra.

The Barnett time limits accordingly work to the detriment of potentially eligible claimants who may be found ineligible because insufficient time was allowed for accurate adjudication.

5. Barnett Requires The Secretary to Pay Non-Refundable Benefits When Time Limits Are Not Met

This is the single most unreasonable aspect of the Barnett court's order and merits extensive analysis. The Secretary would note at this point, however, that each of the specific areas in which this court in White found the order of the lower court reasonable -- lead time, exceptions for evidence development, and recoupment (White at 860) -- the Barnett order is different and less reasonable.

B. The "Non-Refundable" Benefit Requirement Is Totally Unreasonable And Should Serve As A Basis For Reversing The Order Of The Lower Court

The lower court in White ordered SSA to pay benefits to claimants who did not receive decisions on their claims within the time limits required. In Barnett below the court issued a similar order to pay benefits when claimants did not receive a hearing timely, but in Barnett the benefits to be paid are expressly non-refundable.

Although this court in White upheld the authority of the Connecticut District Court to order payment of recoverable benefits, that holding has no bearing on the Barnett order of non-recoverable benefits. This court in White paid specific attention to the fact that benefits under

that order were refundable: "Moreover, payments under the order are to cease if the administrative law judge rules against the claimant, in which case the SSA is entitled to full recoupment for interim amounts . . ." White at 860. Indeed, refundability was one of the very points in which this court thought the White order reasonable.

The Secretary, of course, would first reiterate that there is no legal authority for the lower court to order payment of any benefits without a finding of eligibility, but this is especially true if the benefits are not refundable.

1. Payment of Benefits Without a Determination of Eligibility is Contrary to the Social Security Act

Congress has written into the Social Security Act its explicit concern that only persons who have been determined eligible for benefits should receive SSI benefits:

(B) The requirements prescribed by the Secretary pursuant to subparagraph (A) shall require that eligibility for benefits under this title will not be determined solely on the basis of declarations by the applicant concerning eligibility factors or other relevant facts, and that relevant information will be verified from independent or collateral sources and additional information obtained as necessary in order to assure that such benefits are only provided to eligible individuals (or eligible spouses) and that the amounts of such benefits are correct. (Emphasis supplied). 42 U.S.C. 1383(e) (1) (B). 24/

If benefits are paid under this order, they will be paid to persons for whom there has been no determination of eligibility, for whom, in fact, there have been two determinations of ineligibility. This, in itself, is contrary to the explicit statutory language and the obvious intent of Congress, but the court's order is even more plainly contrary to the Act

24/ See also 42 U.S.C. 1381a.

because, even after a determination has been made after a hearing that the claimant was never eligible, the benefits paid are not recoverable. Such benefits are overpayments, and the Social Security Act explicitly provides for the recoupment of overpayments. 42 U.S.C. 1383(b).

2. Payment of Non-Refundable Benefits is Barred
by Sovereign Immunity

Sovereign immunity bars payment of non-refundable benefits in this action unless there is an applicable waiver of immunity or some exception to the doctrine applies, and there is no applicable waiver of sovereign immunity here. The Social Security Act does not provide a waiver to make payments to persons who are not eligible for benefits, and 28 U.S.C. 1361 has never been construed as a waiver of immunity.

The plaintiffs below advanced the Administrative Procedure Act as a waiver. 5 U.S.C. section 702, as amended, P.L. 94-574, 90 Stat. 2721 (1976) provides:

"An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof asked or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . ."

This provision, however, merely crystalizes the issue to be resolved: whether these non-refundable payments are money damages or equitable relief.

Precisely because the payments ordered are non-refundable, even if the claimant is later found ineligible, these payments are money damages, not equitable relief. Surely there is no basis in equity to pay benefits to ineligible people. Accordingly, the APA is not a waiver of sovereign immunity in this case.

Likewise, there is no applicable exception to the doctrine of sovereign immunity here. Although there is a well-known exception to sovereign immunity when an officer acts beyond his statutory authority, Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), and this case might be so construed, there is also a well-known exception to the exception:

"Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." Id. at 691, n. 11.

This case falls under that exception. Non-refundable payments are not merely an adjunct to the Secretary's compliance with an equitable order, like additional administrative costs, that might be required in order for the defendant to try to meet the order. Non-refundable payments are a direct "disposition of unquestionably sovereign property," and are thus prohibited.

3. The Order of Non-Refundable Benefits is not a Reasonable Exercise of the Lower Court's Equity Power

The court below has characterized the order for non-refundable benefits as an "... adjunct to its proper grant of equitable relief" Order dated July 11, 1977; App. 123. The Secretary respectfully but emphatically disagrees. Non-refundable benefits are not equitable relief. This should be apparent even under the cases relied on by the court below.

The court (App. 123) quoted from Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944) as follows:

"An appeal to the equity jurisdiction conferred on the federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. Winter Haven, 320 U.S. 228, 235. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

In a similar vein, this court in White discussed the order in that case as an "equitable solution to the difficult problem of balancing administrative difficulties and wage earners' needs." White at 860.

The Court's solution in Barnett, however, is not so equitable. It is not " . . . mould[ed] . . . to the necessities of the particular case." Hecht Co., supra. It is not a "nice adjustment . . . between the public interest and private needs." Id. It is not an exercise of "sound discretion". Id. The order in fact is directly contrary to Justice Douglas' observation that "The historic injunctive process was designed to deter, not to punish." Id.

An order for non-refundable benefits is simply not necessary to the equitable relief granted by the court. 25/ The Secretary has been operating in good faith to comply with the court's order and would do so without a requirement to pay non-refundable benefits. Even before the order there was never any suggestion in this case that the Secretary or SSA was acting in bad faith. There was never a suggestion of sloth. The problem in this case has always been one of workload versus resources. As discussed, supra, even the court below acknowledged that SSA was

25/ No other court has required non-refundable payments in these circumstances. See note 28, *infra*. In particular, see Caswell v. Califano, 435 F. Supp. 127, 136 (D. Maine 1977) appeal pending No. 77-1514 (1st Cir.).

making efforts to solve the existing problems, and this court in White characterized SSA's efforts as "commendable," stating: "Judge Clarie [in White below] took note of these problems, and recognized that the SSA had, commendably, tried to overcome them." White at 859.

However, in spite of the Secretary's efforts and this court's recognition of them, the court below ordered payment of non-refundable benefits. This order can only be seen as an effort to somehow punish the SSA if it does not hold timely hearings. Making the benefits non-refundable certainly does not provide any additional help or equitable relief to the claimants who are ultimately found eligible. If they are found eligible they are entitled to the benefits anyway. All the non-refundable aspect of the order does is take money from the general revenue and the disability insurance trust fund, prevent such money from being used for eligible people, and provide a windfall for social security claimants who are not eligible. See Caswell, supra, n. 25. This is not the "equitable solution to the difficult problem of balancing administrative difficulties and wage earner's needs" which this court found in the White order. 26/

The court below has gone far beyond what the Supreme Court required in the monumental case on rights of welfare claimants, Goldberg v.

Kelly, supra. In that case, the high court balanced administrative

26/ Contrast the approach by the United States Court of Appeals for the D.C. Circuit in Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 713 (1975):

"A federal equity court may exercise its discretion to give or withhold its mandate in furtherance of the public interest on effectuating the congressional objective incorporated in regulatory legislation. We think the court may forbear the issuance of an order in these cases where it is convinced by the official involved that he has in good faith employed the utmost diligence in discharging his statutory responsibilities. The sound discretion of an equity court does not embrace enforcement through contempt for a party's duty to comply with an order that calls him 'to do an impossibility.'" [Footnotes omitted]

burdens versus the interests of welfare recipients (which are certainly greater than the interests of welfare applicants), 27/ and required continuation of welfare benefits until a hearing if a recipient appealed after an initial administrative determination of ineligibility. But if the appealing claimant was found not eligible after the hearing, the court certainly did not mandate that the benefits paid to the ineligible claimants could not be recouped; instead it specifically noted the availability of recoupment procedures. See Goldberg v. Kelly, supra, at 266.

Thus, the Secretary submits that the order of non-refundable benefits is unprecedented, illegal, inequitable, unnecessary, unreasonable, and in itself grounds for reversal of the district court's order.

C. Recent Developments in the Social Security Hearing Delay Situation Which Make it Apparent That This Order is Unreasonable and Should be Reversed

Since the decision of the court below and since the decision of this court in White there have been a number of pertinent developments.

There have been more court orders setting time limits on holding social security hearings (or issuing decisions). Caswell v. Califano, 435 F. Supp. 127 (D. Me. 1977) appeal pending No. 77-1514 (1st Cir.); Etier v. Califano, No. 77-0520-WHO (N.D. Cal. Jan. 8, 1978); Wright v. Califano, No. 75-C-1537 (N.D. Ill. Nov. 17, 1977) appeal pending No. 78-1174 and No. 78-1175 (7th Cir.); Martinez v. Califano, No. 73-C-900 (E.D. N.Y.

27/ SSA, as noted supra, follows Goldberg v. Kelly in the SSI program.

opinion issued January 4, 1978). 28/ There also has been a proliferation of new civil actions on this issue. 29/

28/ These are thus added to the list of previously decided cases: Barnett, White, and Mathews v. Blankenship, No. 75-0185 L(A) (W.D. Ky. 1976) appeal pending, No. 76-2342 (6th Cir.).

In Blankenship, supra, the district court ordered hearings in Title II and certain SSI cases in Kentucky within 90 days of request beginning February 1, 1977.

In Caswell, supra, the court ordered hearings in Maine Title II cases within 120 days of request by December 31, 1977, and within 90 days by July 1, 1978.

In Wright, supra, the district court ordered hearing decisions in non-disability Title II cases in Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin within 180 days from request for hearing by January 1, 1978, within 120 days by July 1, 1978, and within 90 days by January 1, 1979, with identical relief for the period of time from request for Appeals Council review to final Appeals Council decision. The order provides that eligibility is to be presumed where the deadlines are not met.

In Etier, supra, the court ordered that after June 30, 1978, the Secretary hold hearings on SSI disability cases in the State of California within 180 days, decision within 30 days thereafter. Every six months the time limits are reduced by 30 days until by January 1, 1980, the Secretary must hold hearings within 90 days and render decisions 30 days thereafter.

A final order has not been issued in Martinez, supra.

29/ Thus in addition to the cases already decided, supra, there are at least the following additional actions in the United States District Courts around the country related to Social Security administrative delays:

Boyle v. Califano, C.D. Cal., No. 77-0466AIS; Deloney v. Mathews, N.D. Ill., No. 74-2989; Dixon v. Quern, N.D. Ill., No. 77-C-1125; Ferguson v. Califano, C.D. Cal., No. 75-2620-RF; Finch v. Califano, W.D. Ky., No. 76-0441L; Harris v. Califano, N.D. Ga., No. 75-1591A; Huntzman v. Califano, E.D. Pa., No. 74-2409; LaCombe v. Califano, D.N.Mex., No. 78-136-P; Mills v. Califano, N.D. Cal., No. 77-1094-WTS; Quintana v. Califano, D. N.M., No. 77-622-M; Santos v. Mathews, D. Mass., No. 75-166G; Soper v. Mathews, D. Mass., No. 76-3171-G; Sturgill v. Mathews, E.D. Ky., No. 75-288.

As time goes by, however, and the orders and suits increase, it is becoming more apparent that each individual court order by the district courts is unreasonable. These court orders, like the one below, are piecemeal, individual jurisdictional approaches to a national problem. The SSA can meet these individual orders, at least for a while, by diverting resources from areas where there is no order to the areas affected by orders. The effect of the orders, though, is not to solve the hearing delay problem nationally, but only to exacerbate it. SSA has only a finite amount of resources available across the country, and the court orders burden the administration's ability to manage and allocate the resources to meet the national needs. While claimants in Vermont are getting hearings in 90 days because of Barnett, claimants in other non-court order jurisdictions are probably waiting longer for hearings than they otherwise would have because of the various court orders. Eventually, if the court orders continue, SSA will simply be unable to comply with them, and there still will be no solution to the hearing delay problem.

The SSA continues to do everything it can meet the problem. The total number of administrative law judges available has increased; productivity has increased; SSA has instituted new management techniques. But there are still not enough resources available to clear up the hearings backlog, meet the increasing number of requests, and hold all hearings nationwide in 90 days.

Ultimately, it is up to Congress to provide the resources or legislative changes necessary to allow SSA to solve this problem. This court may have implicitly acknowledged that fact when it made reference to Congress in White in July 1977:

"We emphasize that Congress can always assert its power to give the district courts more specific direction. But nothing so far seems to rule out the time limits proposed here." White at 860.

Since that time, however, Congress has made it clear that it has ruled out time limits by not enacting any, despite its obvious continuing concern with the hearings issue. In the last year Congress has had before it a number of pieces of proposed legislation on national time limits and other changes in the social security appeals process. 30/ But, significantly, none of this legislation has been passed. Instead, Congress has continued to intensively study the problem. The Center for Administrative Justice Report appeared in October 1977 and may be the basis for Congressional action in the future. However, the only recent legislative response by Congress so far to the problem (and implicitly to White) has been to convert the temporary ALJs appointed under P.L. 94-202, supra,

30/ On June 28, 1977, Representative James A. Burke introduced H.R. 8076, the Disability Insurance Amendments of 1977, which would involve a substantial restructuring of the appeals process, including face-to-face reconsiderations and the establishment of a special disability court under Article I of the Constitution. H.R. 8076: Disability Insurance Amendments of 1977 12-14, Subcommittee on Social Security of the House Committee on Ways and Means (Comm. Print 95-39 (Ways and Means)), 95th Cong., 1st Sess. (1977). In addition, bills are pending which would eliminate the reconsideration stage of appeal (H.R. 1518, January 10, 1977; H.R. 2671, January 31, 1977), and impose time limits on various stages of the appeals process: H.R. 2394 (January 26, 1977) and H.R. 5151 (March 16, 1977) (90 day limit on initial and reconsideration, 120 day limit on hearing and appeals council action); H.R. 2815 (February 1, 1977) (hearing within a "reasonable period of time," decision within 90 days thereafter, except for 110 days for disability issue cases); H.R. 4303 (March 2, 1977) (final decision six months from application date); and H.R. 5072 (March 15, 1977) (informal conference provided at reconsideration with a 90 day limit thereon, no limit on hearing).

to regular permanent ALJs. Social Security Amendments of 1977. Pub. L. 95-216, section 371, 91 Stat. 1509 (December 20, 1977).

This response indicates that Congress is still more concerned about quality of adjudication as opposed to quantity. Congress apparently has established a priority of accuracy over speed. A very recent statement by the Staff of the Committee on Ways and Means discussed the Congressional attitude:

Although Social Security Administration emphasis on the primacy of goals is about equal, the staff has gained the impression over the last 3 years that when either quality or quantity must yield, quality is the element sacrificed. One of the most often expressed rationales for this unwritten but pervasive doctrine is that Congress wants it this way. Bills with processing time requirements and the hundreds of thousands of constituent requests demanding expedited service are pointed to. [footnote omitted] On the other side of the coin, the Subcommittee on Social Security and the full Committee on Ways and Means have expressed great interest in quality adjudication which would be uniform throughout the country. The House report on the Social Security Amendments of 1977 (H. Rept. 702, part 1) stated:

Although your committee's bill does reallocate very substantial revenues into the Disability Insurance Trust Fund and will provide adequate financing into the next century, attention must still be focused on why the costs of the program have risen so rapidly to a level far greater than anticipated. The possibility of not only reducing the cost of the program, but also making it more susceptible to administrative control must be thoroughly explored (p. 2)..

Review of State Agency Decisions: Is Quality Assurance Doing the Job? Staff of the House Subcommittee on Social Security, Comm. Print 95-67 (Ways and Means) 95th Cong., 2d Sess. 8 (1977). Exhibits 66.

Furthermore, the original House Report from the Ways and Means Committee on the 1977 amendments stated:

The committee commends the Social Security Administration for its efforts and the success achieved in increased ALJ productivity but the agency must sustain quality

H.R. Rep. No. 95-617, Part 1, 95th Cong., 1st Sess. 3 (1977).

This renewed expression of Congressional concern for quality adjudication indicates that Congress does not intend for present law to include time limits. Indeed, the congressional concern with quality represents a policy judgment balancing available resources, workload, program and individual needs, and the actions taken by Congress indicate its view that the public interest is best served by assuring that public benefits go only to persons who are truly eligible for them and who truly need them.

Court orders such as the one below are thus counter to the views and concerns expressed by Congress on the hearing delay subject.

In conclusion, the Secretary would point to the summary of the Congressionally-commissioned report by the Center for Administrative Justice. 31/ Discussing the problem of timeliness of hearings the summary stated:

"The characteristic of the hearing process that most enrages claimants and congressmen is its torpidity. The basic causes of the backlog of cases at BHA and the resulting delays are clear -- an increasing demand for hearings without a corresponding increase in the resources (sic) available to process the cases. * * * Substantial, many ALJs believe excessive, attention has been paid to this issue by all levels of BHA personnel and the Congress. Quite dramatic increases in productivity have been achieved through these efforts. Nevertheless, the backlogs continue, the appeal rate is going up and, by our estimate, claimants whether ultimately successful or unsuccessful are paying very high costs for this delay.

We recommend several approaches to the problem of delay. The first and most general is really a caveat. The delay problem relates to only one aspect of decisional quality, albeit the most obvious and easily quantified characteristic. Substantial changes to speed decisionmaking, other than the commitment of more resources to the task, almost always run risks of lowering the quality of the process in other respects. Hence, beyond spending more money, great care should be exercised in making changes to speed the process. * * *." Id. at xix-xx. Exhibits 51, 52.

31/ The Secretary believes that this report, published since the decision by the lower court and since the decision by this court in White, in itself represents a major new development in the factual context of the SSA hearings problems. This is the most in-depth, detailed, and thoughtful study of the situation to date, and the Secretary believes that it cannot be read as viewing imposition of time limits as a reasonable response to the overall problem.

The Secretary believes that this summary (and more fully the entire report) accurately reflect the complexity of the social security hearing delay problem. Admittedly, the Secretary does not now possess the resources necessary to solve the problem, and Congress has not yet discovered any long term solution either. The Secretary, therefore, can only respectfully appeal to this court that the problem will brook no easy, simple, or fast solution. 32/ The Secretary is trying to deal with the problem. Congress is working on it. But orders such as the one by the court below are not a reasonable response, and cannot be the ultimate solution to the national social security hearing delay problem.

IV. Procedural Matters

This court is familiar with the jurisdictional and class arguments advanced by the Secretary below in this case. Similar arguments were advanced and rejected by this court in White. However, the Secretary must respectfully maintain his position that under 42 U.S.C. sections

32/ The Summary to the Center for Administrative Justice Report, supra, at xiv, Exhibits 50, also states:

. . . the more dramatic proposals for reform of the system are inadvisable, either because they are not directed at real problems, because they would be on balance dysfunctional or because their effects are unknown. While the problems that have been identified by others do in various degrees infect the BHA system, we do not find the problems to be so overwhelming that an entirely new system is required. Moreover, we are convinced that significant reforms, of which we suggest a substantial number, must be very carefully analyzed before they are implemented. There are very few reforms that will improve all dimensions of the process at once. Every change requires a tradeoff among relevant values.

And the GAO Report, supra, at 30, Exhibits 30, also said:

. . . [T]here is no quick and simple solution to the problem of hearing delays.

405(g) and (h) and the Supreme Court decisions in Weinberger v. Salfi, 422 U.S. 749 (1975); Mathews v. Eldridge, 424 U.S. 319 (1976); and Califano v. Sanders, 430 U.S. 99 (1977), jurisdiction and class certification were improper in this case below. See defendant's briefs in support of a motion to dismiss, in support of a motion to alter or amend judgment, in opposition to plaintiffs' motion to alter or amend judgment with respect to jurisdiction, and defendant's brief in opposition to certification of a class.

A. Jurisdiction was Inappropriately Found by the Court Below

42 U.S.C. 405(h) establishes that the only appropriate basis for jurisdiction over a claim arising under the Social Security Act is 42 U.S.C. 405(g). Weinberger v. Salfi, supra, at 764. This proposition is reinforced by the Supreme Court's opinion in Mathews v. Eldridge, supra. 33/ Jurisdiction under 28 U.S.C. 1361, as found by the court below, is thus inappropriate here because it is precluded by 42 U.S.C. 405(h).

Section 1361 jurisdiction is also inappropriate in this case under traditional mandamus analysis. Mandamus jurisdiction requires a clear right by the plaintiff to the relief sought and a clear duty on the part of the defendant to provide it. Carter v. Seamans, 411 F.2d 767, 773 (5th Cir. 1969) cert. denied, 397 U.S. 941 (1969). There is no clear

33/ Footnote 12 of Eldridge, at 322, is not to the contrary. The Supreme Court would hardly have gone to the trouble it did of straining to find 405(g) jurisdiction in Eldridge if another basis were available. See Califano v. Sanders, supra, at 109.

right or duty under the Social Security Act which recognizes hearings to be held in 90 days, and there is no authority whatsoever under the Social Security Act for payment of non-refundable benefits.

Jurisdiction as found by the court below under 42 U.S.C. 405(g) is inappropriate because the plaintiffs below did not meet the jurisdictional prerequisites of that section. The Supreme Court's limited exception, stated in Eldridge, to the 405(g) requirements is not applicable to this case. In Eldridge, the court found that the Secretary's decision in terminating Disability Insurance Benefits without a prior hearing was sufficiently final to permit review of a claim that a prior hearing should have been provided. In this case, the claim of the plaintiffs below was that delays in holding hearings hindered their opportunity to secure any decision by the Secretary. Inasmuch as 405(g) requires a final decision by the Secretary in some form for judicial review, jurisdiction is not appropriate here.

The effect of 42 U.S.C. 405(h) admittedly is to bar the courts from reviewing the Secretary's administration of the claims and hearing process under the Social Security Act. However, this is a judgment Congress can make. Cf. Califano v. Sanders, supra. This judgment should be viewed as illustrative of the fact that Congress can take upon itself the responsibility to resolve administrative problems such as those in this case. Congress is, in any event, the only branch of government capable of allocating resources for the nationwide administration of a complex statutory program.

B. Certification of a Class by the Court Below Was Inappropriate

Class, like jurisdiction, was discussed at length below. However, in particular, the Secretary would emphasize that the named plaintiffs below were not necessarily representative of the class as certified nor

were their claims typical of the class. The Secretary believes that the order of the court below emphasizes speed of adjudication over quality, contrary to Congressional intent. To any extent that quality of adjudication may be decreased by this court's order, the order is inimical to the interests of affected members of the class. These members of the class are surely not fairly represented by the named plaintiffs who sought this court order.

In addition, the Secretary notes that 42 U.S.C. 405(g), the only possible source of jurisdiction here, does not contemplate relief on behalf of a class. Salfi, supra, n. 8 at 763.

Conclusion

In view of the foregoing, the decision of the district court should be vacated and remanded for dismissal for lack of jurisdiction over the subject matter. In the alternative, the decision of the district court granting summary judgment to plaintiff should be reversed, and remanded with instructions to grant summary judgment in favor of the defendant.

42 USC 405
SOCIAL SECURITY ACT SEC 205

Sec. 205(d)

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of witnesses and the production of any evidence that relates to any matter under investigation or in question before the Secretary. Such attendance of witnesses and production of evidence at the designated place of such hearing, investigation, or other proceeding may be required from any place in the United States or in any Territory or possession thereof. Subpenas of the Secretary shall be served by anyone authorized by him (1) by delivering a copy thereof to the individual named therein, or (2) by registered mail or by certified mail addressed to such individual at his last dwelling place or principal place of business. A verified return by the individual so serving the subpoena setting forth the manner of service, or, in the case of service by registered mail or by certified mail, the return post-office receipt therefor signed by the individual so served, shall be proof of service. Witnesses so subpoenaed shall be paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(e) In case of contumacy by, or refusal to obey a subpoena duly served upon, any person, any district court of the United States for the judicial district in which said person charged with contumacy or refusal to obey is found or resides or transacts business, upon application by the Secretary, shall have jurisdiction to issue an order requiring such person to appear and give testimony or to appear and produce evidence, or both; any failure to obey such order of the court may be punished by said court as contempt thereof.

(f) [Repealed.]

(g) Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the case for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure

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Sec. 205(i)

of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before he files his answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(h) The findings and decision of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under Section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

(i) Upon final decision of the Secretary, or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this title, the Secretary shall certify to the Managing Trustee the name and address of the person so entitled to receive such payment or payments, the amount of such payment or payments, and the time at which such payment or payments should be made, and the Managing Trustee, through the Fiscal Service of the Treasury Department, and prior to any action thereon by the General Accounting Office, shall make payment in accordance with the certification of the Secretary (except that in the case of (A) an individual who will have completed ten years of service creditable under the Railroad Retirement Act of 1937 or the Railroad Retirement Act of 1974, (B) the wife or husband of such an individual, (C) any survivor of such an individual if such survivor is entitled, or could upon application become entitled, to an annuity under section 2 of the Railroad Retirement Act of 1974, and (D) any other person entitled to benefits

42 USC 1383

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Sec. 1618(a)

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such State must have in effect an agreement with the Secretary whereby the State will—

(3) continue to make such supplementary payments, and

(4) maintain such supplementary payments at levels which are not lower than the levels of such payments in effect in December 1976, or, if no such payments were made in that month, the levels for the first subsequent month in which such payments were made.

(b) The Secretary shall not find that a State has failed to meet the requirements imposed by paragraph (4) of subsection (a) with respect to the levels of its supplementary payments for a particular month or months if the State's expenditures for such payments in the twelve-month period (within which such month or months fall) beginning on the effective date of any increase in the level of supplemental security income benefits pursuant to section 1617 are not less than its expenditures for such payments in the preceding twelve-month period.¹

Part B—Procedural and General Provisions

Payments and Procedures

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Payment of Benefits

Sec. 1631. (a)(1) Benefits under this title shall be paid at such time or times and in such installments as will best effectuate the purposes of this title, as determined under regulations (and may in any case be paid less frequently than monthly where the amount of the monthly benefit would not exceed \$10).

(2) Payments of the benefit of any individual may be made to any such individual or to his eligible spouse (if any) or partly to each, or, if the Secretary deems it appropriate to any other person (including an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse). Notwithstanding the provisions of the preceding sentence, in the case of any individual or eligible spouse referred to in section 1611(c)(3)(A), the Secretary shall provide for making payments of the benefit to any other person (including an appropriate public or private agency) who is interested in or concerned with the welfare of such individual (or spouse).

(3) The Secretary may by regulation establish ranges of incomes within which a single amount of benefits under this title shall apply.

(4) The Secretary—

¹ Section 1618 was added by section 2(a) of P.L. 94-583.

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Sec. 1631(c)

(A) may make to any individual initially applying for benefits under this title who is presumptively eligible for such benefits and who is faced with financial emergency a cash advance against such benefits in an amount not exceeding \$100; and

(B) may pay benefits under this title to an individual applying for such benefits on the basis of disability or blindness for a period not exceeding 3 months prior to the determination of such individual's disability or blindness, if such individual is presumptively disabled or blind and is determined to be otherwise eligible for such benefits, and any benefits so paid prior to such determination shall in no event be considered overpayments for purposes of subsection (b) solely because such individual is determined not to be disabled or blind.¹

(5) Payment of the benefit of any individual who is an aged, blind, or disabled individual solely by reason of blindness (as determined under section 161 (a)(2)) or disability (as determined under section 1614(a)(3)), and who ceases to be blind or to be under such disability, shall continue (so long as such individual is otherwise eligible) through the second month following the month in which such blindness or disability ceases.

Overpayments and Underpayments

(b) Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from or payment to such individual or his eligible spouse (or by recovery from the estate of either). The Secretary shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this title, or be against equity or good conscience, or (because of the small amount involved) impede efficient or effective administration of this title.

Hearings and Review

(c)(1) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for payment under this title. The Secretary shall provide reasonable notice and opportunity for a hearing to any individual who is or claims to be an eli-

¹ Subparagraph (B) was amended by section 4 of P.L. 94-588.

gible individual or eligible spouse and is in disagreement with any determination under this title with respect to eligibility of such individual for benefits, or the amount of such individual's benefits, if such individual requests a hearing on the matter in disagreement within sixty days after notice of such determination is received, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing affirm, modify, or reverse his findings of fact and such decision. The Secretary is further authorized, on his own motion, to hold such hearings and to conduct such investigations and proceedings as he may deem necessary or proper for the administration of this title. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Secretary even though inadmissible under the rules of evidence applicable to court procedure.

(2) Determination on the basis of such hearing, except to the extent that the matter in disagreement involves a disability (within the meaning of section 1614(a)(3)), shall be made within ninety days after the individual requests the hearing as provided in paragraph (1).

(3) The final determination of the Secretary after a hearing under paragraph (1) shall be subject to judicial review as provided in section 205(g) to the same extent as the Secretary's final determinations under section 205.¹

Procedures; Prohibitions of Assignments; Representation of Claimants

(d)(1) The provisions of section 207 and subsections (a), (d), (e), and (f) of section 205 shall apply with respect to this part to the same extent as they apply in the case of title II.

(2) The Secretary may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys, as hereinafter provided, representing claimants before the Secretary under this title, and may require of such agents or other persons, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Secretary. The Secretary may, after due notice and opportunity for hearing, suspend or prohibit from further practice before him any such person, agent, or

¹ Section 1631(c) was amended by section 1 of Public Law 94-202.

attorney who refuses to comply with the Secretary's rules and regulations or who violates any provision of this paragraph for which a penalty is prescribed. The Secretary may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this title, and any agreement in violation of such rules and regulations shall be void. Any person who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant or beneficiary under this title by word, circular, letter, or advertisement, or who shall knowingly charge or collect directly or indirectly any fee in excess of the maximum fee, or make any agreement directly or indirectly to charge or collect any fee in excess of the maximum fee, prescribed by the Secretary, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall for each offense be punished by a fine not exceeding \$500 or by imprisonment not exceeding one year, or both.¹

Applications and Furnishing of Information

(e)(1)(A) The Secretary shall, subject to subparagraph (B), prescribe such requirements with respect to the filing of applications, the suspension or termination of assistance, the furnishing of other data and material, and the reporting of events and changes in circumstances, as may be necessary for the effective and efficient administration of this title.

(B) The requirements prescribed by the Secretary pursuant to subparagraph (A) shall require that eligibility for benefits under this title will not be determined solely on the basis of declarations by the applicant concerning eligibility factors or other relevant facts, and that relevant information will be verified from independent or collateral sources and additional information obtained as necessary in order to assure that such benefits are only provided to eligible individuals (or eligible spouses) and that the amounts of such benefits are correct.

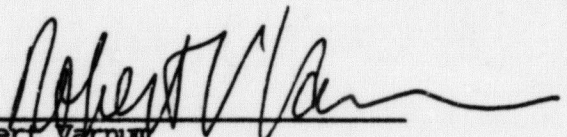
(2) In case of the failure by any individual to submit a report of events and changes in circumstances relevant to eligibility for or amount of benefits under this title as required by the Secretary under paragraph (1), or delay by any individual in submitting a report as so required, the Secretary (in addition to taking any other action he may consider appropriate under paragraph (1)) shall reduce any benefits which may subsequently become payable to such individual under this title by—

¹ Section 1631(d) was amended by section 2 of Public Law 94-202. See excerpt from section 3 of Public Law 94-202 (page 711 of this document) with respect to hearing examination appointed under former section 1631(a)(2).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of March, 1978, I served
this brief by mailing copies to:

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